

1 want to call them that, and kind of nursed
2 them up to where they are comfortable with
3 them.

4 But if a new guy wants to come on,
5 aren't they going to test that new guy out?

6 MR. SCHMIDT: Yes, that would be
7 fair. That would be absolutely fair but that
8 is not what they did. They didn't nurse up
9 Golf and Versus. They gave them the broadest
10 coverage right from the start.

11 JUDGE SIPPEL: Well, it was a
12 younger company then. Comcast was younger
13 then.

14 MR. SCHMIDT: They do that for
15 channels that they get after as well.

16 JUDGE SIPPEL: Oh. You mean like
17 the hockey and the --

18 MR. SCHMIDT: Like the hockey and
19 the baseball. When they get an equity
20 interest, they give them the broader coverage.

21 We thought we were doing what you
22 were supposed to do. We did build up our

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1 channel. We did go out and get the best
2 content for our channel that we could get. We
3 did invest a lot of money in our channel. We
4 did go back to Comcast and say, we'll
5 discount, even beyond the rate that we agreed
6 on, if you give us equal coverage. And that
7 wasn't good enough. That is the essence of
8 discrimination, that they don't have to build
9 up their own channels. They just get there
10 right from the start.

11 The one instance that is a
12 counter-example proves the point. When Golf
13 Channel launched, they initially tried to
14 launch it as a pay extra channel and it didn't
15 do well. So they gave it the broadest
16 coverage possible. That is a different
17 standard.

18 JUDGE SIPPEL: That's kind of a
19 compliment then to the Tennis Channel, that
20 they were able to get the higher \$5 a month
21 from the programming.

22 MR. SCHMIDT: Well no, it is a

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1 severe detriment to the Tennis Channel.

2 JUDGE SIPPEL: No, I know but it
3 is a compliment to the Tennis Channel. You
4 can get them the higher price.

5 MR. SCHMIDT: We would take a
6 compliment of equal carriage. That is what we
7 are looking for.

8 JUDGE SIPPEL: Okay. You don't
9 want any atta boys. You want the deal. Okay.

10 MR. SCHMIDT: Back of the hand
11 atta boys to Mr. Carroll.

12 JUDGE SIPPEL: Is that basically
13 it?

14 MR. SCHMIDT: Yes. Very quickly
15 on harm. Harm is contested. Their documents
16 speak amply to the harm. They did an
17 estimate. They said we have no value on their
18 sports tier. They say you can't survive on
19 the sports tier. There was evidence of harm
20 across the board; advertising, programming,
21 Your Honor spoke about that, viewership.

22 And then the remedy which I have

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1 spoken about, which is simply that if Section
2 616 means what it says, that you have to treat
3 channels equally where they are similarly
4 situated, regardless of affiliation or non-
5 affiliation, the remedy is what we were
6 talking about a moment ago. The remedy is the
7 same level of carriage they give to their
8 similarly situated channels, not some remedy
9 based on the effect of their discrimination in
10 the larger marketplace, both in terms of
11 helping themselves and hurting us but the same
12 carriage they give to their own channels.
13 That is the remedy.

14 JUDGE SIPPEL: If I am saying it
15 correctly, you want parity.

16 MR. SCHMIDT: Yes.

17 JUDGE SIPPEL: You want parity
18 with two channels, with two programs, Versus
19 and Golf.

20 MR. SCHMIDT: Yes, sir.

21 JUDGE SIPPEL: So hockey and Major
22 League Baseball, that is off the table. We

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1 don't have to think about that, for purposes
2 of this.

3 MR. SCHMIDT: Yes.

4 JUDGE SIPPEL: If I say this, it
5 means for purposes of a remedy.

6 MR. SCHMIDT: Yes, we focused our
7 case on Golf and Versus. To us the relevance
8 to the hockey channel and the baseball
9 channel, which are not 100 percent owned by
10 Comcast and don't receive 100 percent carriage
11 by Comcast, the relevance of them is they
12 speak to some of these defenses that Comcast
13 has raised, like the date matters because we
14 know those channels came along later in terms
15 of equity and they still got broader carriage.

16 What Section 616 calls for is
17 parity, exactly as Your Honor said. And to
18 us, that is parity in terms of the level of
19 carriage. It is also parity in terms of the
20 channel placement. We heard a lot of
21 testimony about how channel placement matters,
22 how it matters if they give themselves a

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1 channel number in the low 20s --

2 JUDGE SIPPEL: Oh, I see, channel
3 placement.

4 MR. SCHMIDT: Channel placement,
5 exactly. And we are up in the 600s or the
6 700s at the end of the dial is where we are.

7 JUDGE SIPPEL: Jesus, that is
8 above the Sierras.

9 MR. SCHMIDT: The Enforcement
10 Bureau talked about the channel placement
11 remedy. We believe in that channel placement
12 remedy.

13 If I have any minutes left, I
14 would like to save just a couple minutes at
15 the end. That covered the points that I
16 wanted to cover.

17 Basically, similarly situated
18 networks with wildly different treatment and
19 the only justification they offer for that
20 different treatment is defenses that only
21 apply to Tennis Channel and never apply to the
22 Comcast channels. That is the essence of a

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1 616 violation.

2 JUDGE SIPPEL: And back to what I
3 asked before and I just am repetitive here but
4 you want the 2005 contract applied at the
5 better tier, --

6 MR. SCHMIDT: Yes, Your Honor.

7 JUDGE SIPPEL: -- with the better
8 channel.

9 MR. SCHMIDT: Yes, Your Honor.

10 JUDGE SIPPEL: That is basically
11 it.

12 MR. SCHMIDT: Yes.

13 JUDGE SIPPEL: Okay. Would
14 another hearing be required for that?

15 MR. SCHMIDT: I don't think so. I
16 think that --

17 JUDGE SIPPEL: It's pretty
18 straightforward, isn't it?

19 MR. SCHMIDT: I think it is pretty
20 straightforward.

21 JUDGE SIPPEL: All right. I don't
22 know that it is going to be there but anyway,

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1 we all have to plan our lives.

2 All right, that's it.

3 MR. SCHMIDT: That's it, Your
4 Honor. If I may reserve --

5 JUDGE SIPPEL: Thank you very
6 much.

7 MR. SCHMIDT: -- a few minutes, I
8 would love to do that.

9 JUDGE SIPPEL: I beg your pardon?

10 MR. SCHMIDT: If I may reserve a
11 few minutes at the end, taking Your Honor up
12 on the invitation.

13 JUDGE SIPPEL: A few minutes, yes.
14 But I think we have covered the waterfront
15 very well.

16 MR. SCHMIDT: We have, Your Honor.

17 JUDGE SIPPEL: Sorry, just a
18 minute.

19 Mr. Carroll, I know you are up
20 next. Sorry for this delay. Again, I am
21 going to ask are you comfortable? I am. I
22 mean, if you are --

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1 MR. CARROLL: Your Honor, I love
2 being here. I'm comfortable.

3 JUDGE SIPPEL: Justin's got the
4 air conditioner, too.

5 (Laughter.)

6 JUDGE SIPPEL: Thank you very much
7 That's a compliment.

8 MR. CARROLL: Good morning again.

9 JUDGE SIPPEL: Good morning again,
10 sir. And I am just going to ask you this
11 procedurally, please make your initial
12 statement, you will I know, but we have a lot
13 of questions. And my colleague, Ms. Bergold
14 is going to pretty much handle those
15 questions. There is a lot of them.

16 So it might be rude to interrupt a
17 little bit but we may have to do that. But we
18 are going to let you, you can get in
19 everything that you want to get in, whether it
20 is now or in the middle or at the end.

21 How were you thinking of it?

22 MR. CARROLL: I was looking

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1 forward to the questions and actually, my
2 planned remarks I have already put to the side
3 in the hopes that I would follow-up on some
4 things that were already said. So I view this
5 as a dialogue at this point, frankly.

6 There are some points I wanted to
7 address that were covered already.

8 JUDGE SIPPEL: Why don't you do
9 that?

10 MR. CARROLL: But I'm not going to
11 come here and give some oration. I want to be
12 responsive to what the bench here is asking in
13 the way of questions and what would be
14 helpful.

15 JUDGE SIPPEL: Save your Broadway
16 presentation for the New York courts.

17 MR. CARROLL: You know what? - I'm
18 not Broadway.

19 (Laughter.)

20 MR. CARROLL: That dog -- What is
21 it? That dog won't hunt.

22 JUDGE SIPPEL: Okay, well you go

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1 ahead but be prepared to get some questions.

2 MR. CARROLL: Okay. Let me just
3 say one thing at the outset, which is it was
4 clear to me from listening to the first part
5 of the session that Your Honor is paying very
6 careful attention to the record. And I thank
7 the Court for that and I think it is vitally
8 important in a case like this, critical
9 because there are so many assumptions that are
10 made about my client; so many efforts to make
11 general policy arguments about what my client
12 must be up to; in our view, so many efforts to
13 import statements in a NBC merger order and
14 continue to use them and not look at the
15 actual evidence that we had. And we had a
16 hearing here. You had those witnesses sitting
17 right there. You can look them in the eye,
18 you listen to the testimony --

19 JUDGE SIPPEL: Bond twice.

20 MR. CARROLL: Mr. Bond twice. And
21 I spent -- Are you ready for this? And this
22 is an indication of how non-Broadway I am. I

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1 spent my weekend reading the 2800 pages of the
2 trial transcript in this matter. And --

3 JUDGE SIPPEL: Was it good?

4 MR. CARROLL: -- that is how it --

5 (Laughter.)

6 MR. CARROLL: You know what is
7 interesting about it? You always see things -
8 - Because when you are questioning a witness
9 at the time, you have impressions and you
10 think you are hearing things a certain way.
11 But when you go back and it, it is amazing how
12 much information and detail is there that is
13 beyond what you heard or different than what
14 you heard. And I want to focus on the record.
15 Most of what I want to do here is make some
16 points about the record and let me start
17 there.

18 I am struck by two things at the
19 outset. One, how little reference there is to
20 the record in the real record in terms of the
21 Enforcement Bureau's recent submission, which
22 obviously we are not happy about, but it

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1 relied very little on the record and mis-cited
2 the record in sort of a lot of ways. It got
3 people's names wrong, got people's positions
4 wrong and almost treated the record as if the
5 record doesn't matter because we know it is
6 Comcast and we know they had that NBC merger
7 order which they cite several times in their
8 submission. And again, it seems to me this
9 effort is an independent defacto -- Look into
10 the facts based on the factual record that we
11 developed at this hearing.

12 The second things that strikes me
13 about my worthy adversary Mr. Schmidt's
14 comments this morning is how many times he
15 makes statements that are nowhere in the
16 record, based on my reading, and in fact are
17 the opposite of what is in the record. And I
18 will give you a few examples.

19 He made a statement this morning
20 about Mr. Rigdon having said he has a policy
21 and he will never give Tennis Channel any
22 broader carriage. That is completely wrong.

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1 Mr. Rigdon was on the stand and at page 1816
2 of the transcript gave exactly the opposite
3 testimony. I don't think that is fair in this
4 proceeding to make generalized statements that
5 don't track what the record evidence really
6 is.

7 Now, you got a chance to see Mr.
8 Rigdon. You can decide, Your Honor, as the
9 fact finder how much credibility to give to
10 testimony and I think that is a critical part
11 of your role. And I want to talk about that
12 in particular with respect to Mr. Solomon in
13 a second because the Enforcement Bureau makes
14 no reference to Mr. Solomon. Tennis Channel
15 barely makes any reference to Mr. Solomon and
16 I think there is a very good and telling
17 reason for that when you look at some of his
18 testimony, which Your Honor may remember.

19 JUDGE SIPPEL: Well when you hear
20 some of the questions, you are going to
21 realize we do know the record pretty well.

22 MR. CARROLL: All right. Now, I

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1 know you know it and I am actually --

2 JUDGE SIPPEL: A little bit
3 better, too.

4 MR. CARROLL: I am very comforted
5 by that because that is what this proceeding
6 is supposed to be about.

7 Mr. Schmidt was asked a question
8 by you about aren't there other independent
9 networks that get broader coverage on Comcast
10 and he said I can only think of three. Now
11 his own expert has put in a report that lists
12 about ten more, which are all the RSNs.

13 JUDGE SIPPEL: Mr. Singer?

14 MR. CARROLL: Mr. Singer.

15 JUDGE SIPPEL: Dr. Singer.

16 MR. CARROLL: Dr. Singer.
17 Regional Sports Networks, I think this is
18 Tennis Channel Exhibit 20, if I am reading
19 notes correctly. And he has listed Regional
20 Sport Networks around the country that my
21 client has no ownership in that are
22 competitors for sports programming, the same

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1 kind of sports programming we are promoting,
2 and they are all getting D0-D1 carriage in
3 these places.

4 In addition, and this is to me
5 even more striking, one of the most striking
6 pieces of proof in my humble judgment during
7 Mr. Solomon's examination was you may remember
8 I asked him about two independent channels
9 that four months after his meeting with Mr.
10 Bond, you remember the meeting that is in May
11 of 2009 and that follows up with a phone call
12 in June of 2009, and that is why we are all
13 here. They are suing because they claim we
14 should have been obligated to take their
15 proposal. It was discriminatory of us not to
16 have taken the proposal that they made at the
17 time.

18 MS. BERGOLD: Isn't their argument
19 somewhat broader than that? Like, they are
20 suing because they believe that Comcast is
21 discriminating on the basis of affiliation and
22 that may have happened. And that the 2009

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1 rejection of their proposal is evidence of
2 that but that it is continuing. That there is
3 disparate treatment and there is a continuing
4 violation.

5 MR. CARROLL: They are making that
6 argument now, I believe, and there are some
7 big problems with it. One may be for an
8 appeal someday, which is that they have a
9 serious statute of limitations problem --

10 MS. BERGOLD: Yes, but --

11 MR. CARROLL: -- so therefore they
12 can't -- If they were arguing it was generic,
13 they would walk right into the problem that
14 they have known about the generic situation
15 since 2005. And Mr. Solomon said himself on
16 the stand in response to my questions, he is
17 not claiming there was any discrimination, for
18 example, in 2007, when the MFN offer was
19 turned down there. But he acknowledged there
20 was no discrimination.

21 So however generic it is, by their
22 presentation here, they can't be laying a date

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1 to it that is prior to this meeting. At
2 least, I have never heard them do that. And
3 that is a critical starting point for us.

4 Now I do grant you they are trying
5 to argue that it is an ongoing discrimination
6 since then because we haven't done anything to
7 alleviate the problem.

8 MS. BERGOLD: Well, I understood
9 that what they were saying is since they
10 elected to be an improved network, that they
11 have improved in the network, that they have
12 become similarly situated at this time and in
13 2009 and now they are similarly situated with
14 Golf and Versus and the disparate treatment.

15 MR. CARROLL: They have cast their
16 argument that narrowly here. And I agree with
17 you. They are trying to argue that they were
18 different, sufficiently different in 2009,
19 that starting at that point --

20 MS. BERGOLD: Okay, starting at
21 that point but it was -- I don't think they
22 are arguing only that this is the

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1 discrimination, is the rejection of the
2 agreement, they are arguing that the
3 discrimination is the disparate treatment
4 between similar situated, allegedly similarly
5 situated channels.

6 MR. CARROLL: Well if you look at
7 the pleadings, they start it by claiming it
8 was the meeting. They briefed it in the
9 pretrial meeting by saying the essence of this
10 is that offer that was made at the meeting and
11 was turned down. And the other thing I would
12 just --

13 MS. BERGOLD: Isn't that evidence,
14 though, and not what their cause of action is?

15 MR. CARROLL: Well, I leave it to
16 you to sort this out but I will say they have
17 been moving on this. And I think it is
18 important to have a benchmark for the
19 following reason. It is a discrimination
20 case. Their view seems to be that if they can
21 show substantial similarity and disparate
22 treatment, they win. And that is completely

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1 wrong in our view. They have to show
2 discrimination.

3 You can have things that are
4 similar that are treated differently for
5 nondiscriminatory reasons. This is not a
6 common carrier case. This is a discrimination
7 case. *Wealth* and *MASN, Wealth* now affirmed by
8 the FCC, stand for the proposition and I could
9 read some -- Your Honor, you have some great
10 quotable quotes from the *Wealth* decision to
11 the effect that you have got to show that the
12 motive was acted on in a particular instance.
13 You have to show some activity, some action,
14 something my client did that was based on
15 discrimination and reveals the discrimination.

16 They have centered that proof
17 around 2009 because you remember Mr. Solomon
18 said we thought we made them an irresistible
19 offer. It must have been discrimination that
20 caused us to turn that down. It was
21 discriminatory. That is proof of the
22 discrimination, if you will.

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1 And they need that because it is
2 not enough, I submit to you, at all to say
3 similar network, disparate treatment, we win.
4 If it were, that would be a carry one-carry
5 all rule. Every time we carry a sports
6 channel, right, we now have to carry every
7 sports channel that everybody pitches to us
8 and my client gets its three --

9 MS. BERGOLD: Well not every
10 sports channel would be similarly situated.
11 ESPN, I think Mr. Schmidt said, was not
12 similarly situated.

13 MR. CARROLL: Oh, no. He says it
14 is similarly situated, it is just a lot more
15 powerful economically, that the programming,
16 ESPN carries more tennis, you know, as much
17 tennis as anybody. It probably has as much
18 tennis as his client does. They are very
19 similarly situated except their market
20 leverage is a lot different.

21 Now to me, that gets to a vital
22 point, which is the Congress has said

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1 initially and I think the FCC has endorsed
2 this view, you are supposed to give the
3 maximum latitude to the market to work here.
4 This is not a case where vertical integration
5 is being outlawed under Section 616. Right?

6 Although, to listen to Mr. Schmidt
7 argue it, I guess it was outlawed. Because
8 basically I heard him to say, in answer to
9 Your Honor's questions this morning about what
10 if they just stay with their networks in that
11 earlier period before you were born, he was
12 basically holding in there and saying, no,
13 they can't do that. They can't do that.

14 They own the company. You are
15 allowed to promote the companies you own.
16 That is what vertical integration is. His
17 argument, and I submit that would be the
18 effect of a ruling in his favor in this case,
19 would gut and forever more end vertical
20 integration in this industry and that has
21 never happened.

22 The reason it is unprecedented,

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1 the point we are at here, as he pointed out in
2 his opening comments, it is unprecedented
3 because there is not a carry one-carry all
4 rule. It is not the law that if you can show
5 you are similar and appealing to basically the
6 same sports fans and offering sports
7 programming, and that would cover an awful lot
8 of programs out there, and you have got one
9 that is launched on a certain channel, you
10 have to carry them all that way.

11 You have a question. You seem to
12 have one. If not, I am not --

13 MS. BERGOLD: Yes.

14 MR. CARROLL: You looked like you
15 had one so I was going to pause. But
16 otherwise, I will keep going.

17 MS. BERGOLD: Well if you have a
18 -- If there is a discriminatory impact and the
19 perpetuation of discrimination is in a
20 company's economic interest, would you say
21 there was a violation of Section --

22 MR. CARROLL: No. Impact doesn't

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1 get you there. This is not disparate impact
2 law. The Title VII cases that they cite, you
3 know, for their racial discrimination test --

4 MS. BERGOLD: Well, let me give
5 you an example.

6 MR. CARROLL: All right.

7 MS. BERGOLD: And this is an
8 analogous in a different, let's say employment
9 discrimination.

10 MR. CARROLL: Yes.

11 MS. BERGOLD: Say you have a large
12 department store and it has individual
13 contracts with its employees. And every
14 contract has a female employee that is paid 70
15 percent of what a male employee for the same
16 mark and they have these series of contracts.
17 The department store is in somewhat financial
18 trouble. The union comes and says, we have
19 got to change these contracts. We have to
20 have 100 percent parity. There is one job
21 description. All the women have to be paid
22 the same as all the men.

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1 The department store says I am
2 going to do a cost-benefit analysis. I am
3 going to see. And they say, no this doesn't
4 work. It is going to cost us millions of
5 dollars in extra money. We don't get any
6 additional value. Is that discrimination to
7 perpetuate this discriminatory --

8 MR. CARROLL: Is there any reason
9 for the price for the difference in salary
10 other than sex? This is the *Man Hour* case I
11 think that you are referencing.

12 I would tell, I would say bring a
13 claim and I will bring it for them. Because
14 under that scenario, if you are telling me
15 that there was no reason for the different
16 salary distinction, other than women versus
17 men, it is blatant discrimination. But --

18 MS. BERGOLD: But they would say,
19 but you didn't --

20 MR. CARROLL: -- supposing there
21 are other reasons -- No, no. It would not be
22 legitimate current. I am agreeing with you,

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